the prosecution with regards the age of the Accused. The Accused, in his defence, had given evidence that he was under 18 years of age at the time of committing the offence and the Court cannot say, on the evidence before the Court and upon visual inspection of the Accused, that the Accused cannot be under 18 years of age at the time of committing the offence. There is no doubt that the Accused is a youthful person with his rather surprisingly smooth complexion. I cannot say that it is incredible that he was not yet 18 at the time of the alleged offence. At the very least there is a doubt as to the age of the Accused and the doubt must be resolved in favour of the Accused.

Though I have earlier by citing various authorities cast doubt in the correctness of the decision of *John Anak Bin Liman* case that the age of the Accused is peculiarly within the knowledge of the person because, I am of the opinion, one's knowledge of one's birth can only come from someone else or from the registry of birth, I nevertheless have to abide by the decision, it being a decision of the then Federal Court. But that case is still of no help to the prosecution because there is no evidence at all, in view of the inadmissibility of the statement of the Accused as to his age, as to the age of the Accused. In any event and in view of *Senevirante* case, *John Anak Liman* case must not be read as laying down the law that it is for the Accused to establish his age before he can escape the death sentence. The solution to the problem which this case has highlighted may lie in the amendment of the Dangerous Drugs Act 1952 to provide for the necessary presumption of age.

Given my decisions above and in accordance with s. 16 of the Juvenile Courts Act, 1947, I order the Accused be detained during the pleasure of His Excellency, the Yang Di-Pertua Negeri Sabah.

The cannabis is to be destroyed by burning in the compound of the Court and in the presence of the Senior Assistant Registrar of the High Court in Borneo at Tawau.

PUBLIC PROSECUTOR

v.

MOK JIN SHING & 3 ORS.

HIGH COURT, SIBU
TUAN STEVE SHIM LIP KIONG J.
[CRIMINAL APPEAL NO. 8 OF 1992]
18 JANUARY 1993

CRIMINAL LAW & PROCEDURE: Appeal against sentence imposed by lower Court - Inadequacy of sentence - Whether decision of lower Court should be disturbed - Whether sentences passed commensurate with gravity of offence - Principles applicable.

The Public Prosecutor appealed against the sentences imposed on the respondents who were charged with and convicted of assisting in carrying on an illegal lottery. The learned DPP contended that the trial Magistrate did not consider sufficiently or at all the question of public interest in passing sentences on the respondents.

Held:

[1] Having regard to the public interest, the nature of the offences, its mode of commission, the background, character and antecedents of the respondents, the fines imposed on the first, second and fourth respondents and the binding over order made on the third respondent were manifestly inadequate in all the circumstances.

[2] The exhibits seized by the police were found in the room or rooms where the illegal 4-digit operation was going on which must suggest that they were used for the purpose of the operation. There is nothing to indicate or suggest that the exhibits in question belonged to any of the respondents. The exhibits are forfeited to the Government.

[Appeal allowed].

Cases referred to:

*R v. Ball 35 Cr. App. R. 164 (**refd**)*
*New Tuck Shen v. Public Prosecutor [1982] CLJ 38 / [1982] 1 MLJ 27 (**refd**)*

Legislation referred to:

Gambling Ordinance s. 4(c)
Criminal Procedure Code, s. 294

For the appellant - Mohd. Zaki bin Md. Yasin, SFC
For the respondents - Richard Wong Ho Leng; M/s. Wong Ho Leng & Co.

JUDGMENT

Steve Shim Lip Kiong J:

This is an appeal by the Public Prosecutor against the sentence imposed by the lower Court. The four respondents were charged in the Magistrate's Court, Sibu, for assisting in carrying on a public lottery to wit, illegal 4-digit lottery under s. 4(c) of the Gambling Ordinance. They pleaded guilty and were convicted accordingly. The 1st, 2nd and 4th respondents were each sentenced to 1 day imprisonment and a fine of RM300 in default 1 month imprisonment whereas the 3rd respondent was bound over for good behaviour for 1 year in the sum of RM200 with one surety. Various grounds have been promulgated in the petition of appeal but essentially, they can be reduced to one significant issue, namely, that the learned Magistrate did not consider sufficiently or at all the question of public interest in passing sentences upon the respondents. This stand is reverberated in the submission of the learned Deputy Public Prosecutor.

Although over the years, theories in relation to the aims of sentencing have multiplied, the Courts have, I think, steadfastly and in the main, followed the principles enunciated by Hilbery, J. in *R v. Ball* 35 Cr. App. R. 164 wherein he said *inter alia*:

> In deciding the appropriate sentence a Court should always be guided by certain considerations. The first and foremost is the public interest. The Criminal law is publicly enforced, not only with the object of punishing crime, but also in the hope of preventing it. A proper sentence, passed in public, serves the public interest in two ways. It may deter others who might be tempted to try crime as seeming to offer easy money on the supposition, that if the offender is caught and brought to justice, the punishment will be negligible. Such a sentence may also deter the particular criminal from committing a crime again, or induce him to turn from a criminal to an honest life. The public interest is indeed served, and best served, if the offender is induced to turn from criminal ways to honest living. Our law does not, therefore, fix the sentence for a particular crime, but fixes a maximum sentence and leaves it to the Court to decide what is, within that maximum, the appropriate sentence for each criminal in the particular circumstances of each case. Not only in regard to each crime, but in regard to each criminal the Court has the right and the duty to decide whether to be lenient or severe.

Quite clearly therefore, what is an appropriate sentence must depend on the particular facts and circumstances of each case. However, the Court should always take into consideration the public interest which is of foremost importance. But public interest, according to Wan Yahya J. in *New Tuck Shen v. Public Prosecutor* [1982] 1 MLJ 27 varies according to the time, place and circumstances of each case including its nature and prevalence.

In the instant case, the admitted facts show that when the police raided the house at No. 9A Lorong Pipit, Sibu, they found the four respondents in a room with all the equipment used for operating an illegal 4-digit lottery. It has been said by the learned Deputy Public Prosecutor, and I quite agree, that illegal 4-digit lotteries are still rife in Sarawak and the authorities are trying very hard to stamp them out. This is a matter of common knowledge. The Court should take this factor into account in passing sentence. Public interest demands it. The learned Magistrate appears not to have done so but I think in all fairness to her, the prosecuting officer should have drawn this to her attention.

It should be noted however that in activities of this nature, the main culprits are invariably those elusive characters, the operators who are prepared to take risks obviously in view of the enormous financial benefits to be derived therefrom. Conceivably, they would be the kingpins behind these illegal operations and they are the ones, because of the sophisticated and elaborate nature of the set-up, likely to evade capture by the authorities. Here, it seems clear that the respondents were not operators in the sense that they could not have master-minded the whole operation or provided the financial resources to run it. They were merely employees in the operation. Of course it can be argued that as employees, they form a vital corroborative and supportive segment in the whole operation but they would still, on any comparative analysis, be considered as playing a much less significant role in contrast to those shadowy creatures, namely, the operators and kingpins in such a sordid industry. In my view, this factor has also to be considered by the Court without necessarily overlooking the seriousness of the offence with which the respondents have been convicted. The learned Magistrate appears to have grounded her decision essentially on the character and antecedents of the

respondents when imposing the various sentences. As I have said, she has not considered that 4-digit lotteries, which are rife in the State, should be contained in the public interest. Had she done so or if her attention had been drawn to this factor, she would probably impose much heavier fines on the respondents and certainly would not have invoked s. 294 of the Criminal Procedure Code in binding over one of them for good behaviour. In my view, having regard to the public interest, the nature of the offences, its mode of commission, the background, character and antecedents of the respondents I would consider the fines imposed on the 1st, 2nd and 4th respondents and the binding over order on the 3rd respondent to be manifestly inadequate in all the circumstances. I shall therefore substitute the sentences as follows, namely, that the respondents be each incacerated for a period of 1 day in His Majesty's Prison and a fine of RM1,000 in default 1 month imprisonment.

As regards the returned exhibits P5, P8, P16 and P19, these were seized by the police in connection with the offence. They were found in the room or rooms where the illegal 4-digit operation was going on. This must clearly suggest that they were used for the purpose of the operation. There is nothing to indicate or suggest that the exhibits in question belonged to any of the respondents who, on the admitted facts, were apparently mere employees in the operation. They are more likely to belong to the operators, the kingpins behind the scene. The learned Magistrate did not appear to have considered all these factors. In the circumstances, the order to return the exhibits P5, P8, P16 and P19 is quite wrong and should be reversed. They are to be forfeited to the Government.

For all the reasons given and to the extent stated, this appeal is allowed.

RED AND YELLOW OMNIBUS CO. SDN. BHD. & ANOR.

v.

CHUAH LAY BOON

HIGH COURT, TAIPING
DATO HJ. ABDUL MALIK B.
HJ. ISHAK JC
[CIVIL APPEAL NO. 12-3-92 (91)]
18 FEBRUARY 1993

TORT: Road accident - Appeal against quantum - Damages awarded for injuries not pleaded - Whether permissible.

PRACTICE & PROCEDURE: Injury not pleaded in statement of claim - Trial Court awarding damages in respect of injuries not pleaded - Whether damages recoverable - Medical reports forming part of agreed bundle of documents - Whether dispenses with proof of existence or execution of document - Whether dispenses with proof of contents of document.

The appellants admitted liability for negligence in the trial Court but appealed against the damages awarded to the respondent for injuries to the left little finger on the grounds that the said injuries were not pleaded in the statement of claim. The appellant also sought to set aside the award for partial loss of future earnings.

Held:

[1] In a motor accident claim where negligence is proved or admitted, a plaintiff is entitled to be awarded damages only in respect of injuries which are pleaded and which are proved or admitted to have been caused by the negligence of the defendant.

[2] The injury to the left little finger is nowhere pleaded in the respondent's statement of claim and the respondent was not entitled to damages for this injury.

[3] The respondent was below 30 years of age at the time of the accident and the trial Court was right in awarding a multiplier of 16 for the loss of future earnings. There was nothing on record to justify reversing the award of the trial Court under this head of damages.

[4] Once a document is included in an agreed bundle it is no longer necessary to prove its existence or execution nor is it necessary to produce the original. The truth of the contents